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NO. 83-5908

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BILLIE JUNIOR ALLEN,

Appellant,

vs.

STATE OF IOWA,

Appellee.

MOTION TO DISMISS

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MOTION TO DISMISS

COMES NOW the named Appellee, the State of Iowa, through counsel and hereby moves to dismiss the appeal of Billie Junior Allen pursuant to United States Supreme Court Rules 16.1(a) and 16.1(b) and in support thereof states that:

1. Appellant stands charged with burglary in the first degree in violation of Iowa Code §§ 713.1 and 713.3 by trial information filed December 2, 1982.

2. On September 16, 1983, Appellant filed a Motion to Dismiss alleging, inter

alia, that prosecution of Appellant violated the Double Jeopardy Clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment.

3. Appellant's motion was heard in the Iowa District Court in and for Polk County on September 28, 1983, and on November 3, 1983, a ruling was issued denying Appellant's motion.

4. Appellant filed a notice and application for discretionary review in the Iowa Supreme Court on November 3, 1983. Appellant's application was denied on November 4, 1983.

5. On November 4, 1983, Appellant filed a notice of appeal in the Polk County District Court. The State moved the Iowa Supreme Court to dismiss Appellant's appeal on November 7, 1983, for lack of jurisdiction. The appeal was dismissed the same date.

6. On November 7, 1983, Appellant filed an action under 42 U.S.C. § 1983 in the

Federal District Court for the Southern District of Iowa and sought a stay of the state criminal proceedings. That court, the Honorable W. C. Stuart presiding, ordered a stay of the state criminal proceedings for 30 days to allow Appellant to file an appeal in this Court.

7. Appellant filed a notice of appeal on December 7, 1983 pursuant to 28 U.S.C. § 1257(2) appealing the order of Chief Justice W. W. Reynoldson, dismissing without prejudice Appellant's appeal to the Iowa Supreme Court. A jurisdictional statement was filed on December 12, 1983.

8. A right to appeal is provided under 28 U.S.C. § 1257(2) from "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity."

9. This appeal is not within this Court's jurisdiction under 28 U.S.C. § 1257(2) for the following reasons:

a. The order of Chief Justice W. W. Reynoldson does not constitute a final judgment or decree of the highest court of the State of Iowa in which a decision could be had on the issue of whether the instant prosecution violates double jeopardy. Appellant's appeal runs to the wrong court. An appeal on that issue must run to the Iowa District Court in and for Polk County since, as Appellant concedes, Appellant's appeal in the Iowa Supreme Court was not dismissed on its merits. Norfolk & S. Turnpike Co. v. Virginia, 225 U.S. 264, 269 (1912); Western Union Telegraph Co. v. Hughes, 203 U.S. 505, 506-07 (1906).

b. The ruling of the Iowa District Court in and for Polk County denying Appellant's motion to dismiss for violation of double jeopardy does not constitute a ruling in favor of the constitutional validity of a state statute and thus no jurisdiction attaches to that ruling under 28 U.S.C. § 1257(2).

c. The order of Chief Justice W. W. Reynoldson dismissing Appellant's direct appeal to the Iowa Supreme Court does not constitute a ruling in favor of the constitutional validity of Iowa Code § 814.6(1) (1983) because there is no record that the constitutional validity of section 814.6(1) was presented to or ruled on by the Iowa Supreme Court. Webb v. Webb, 451 U.S. 493, 498-501 (1981); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

10. This appeal does not present this Court with a substantial federal question and should be dismissed.

a. Appellant has no constitutional right to appeal. Abney v. United States, 431 U.S. 651, 656 (1977). State law provides that a defendant can raise the question of double jeopardy prior to trial in the district court and, in the event that a defendant is unsuccessful there, an application for discretionary review may be made to the Iowa Supreme Court. The constitution does not require more.

b. The Double Jeopardy Clause does not bar the successive prosecution of the Appellant for first degree burglary following an acquittal of first degree felony murder based on robbery because each offense requires proof of an

additional fact that the other does not. Illinois v. Vitale, 447 U.S. 410, 416 (1980).

c. Appellant's disagreement with the Iowa District Court over application of this Court's decision Ashe v. Swenson, 397 U.S. 436 (1970), does not constitute a substantial federal question; in addition, the doctrine of collateral estoppel does not bar successive prosecution of separate offenses that arise from the same facts except where the prosecutions contain an identical issue of ultimate fact that is finally decided in the first prosecution. Id. at 443. As the district court correctly found after a complete examination of the prior proceedings, the instant prosecution for first degree burglary does not raise an issue necessarily decided

in the initial prosecution for felony murder.

WHEREFORE, the State of Iowa respectfully requests that this appeal be dismissed.

Respectfully submitted,

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NO. 83-5908

BILLIE JUNIOR ALLEN,

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Appellee.

BRIEF IN SUPPORT OF MOTION TO DISMISS

In this action, Appellant, Billie Junior Allen, seeks to appeal an order of Chief Justice W. W. Reynoldson of the Iowa Supreme Court dismissing Appellant's appeal to the Iowa Supreme Court. For the reasons stated below, this appeal should be dismissed.

STATEMENT OF THE CASE

Appellant has been charged with burglary in the first degree in that on or about March 5, 1982, Appellant committed burglary in the

first degree upon the property of Clifford Welling and intentionally or recklessly inflicted physical injury upon Clifford Welling. (Appellant's App. D, p. 3.)

Appellant had been previously charged with murder in the first degree in that he did commit or aid and abet in the commission of murder in the first degree resulting in the death of Clifford Welling. (Appellant's App. D, p. 3.) Burglary was not submitted to the jury either as a lesser included offense or as a felony under felony murder in the prosecution for felony murder. (Appellant's App. D, p. 3.) The trial court submitted murder in the first degree with no aiding and abetting instruction. (Appellant's App. D, p. 19.) The case was tried and instructed on the theory that the Appellant was the one who actually stabbed and killed the victim. (Appellant's App. D, p. 19.) An instruction concerning felony murder was given, with robbery as the underlying felony.

(Appellant's App. D, p. 19.) Appellant was acquitted of the murder charge.

On September 16, 1983, Appellant filed a motion to dismiss on the ground, inter alia, that Appellant was being placed twice in jeopardy in violation of the Fifth and Fourteenth Amendments and that the Appellant's prosecution for burglary was precluded under the theory of collateral estoppel/issue preclusion. Appellant's motion was overruled. The district court rejected Appellant's double jeopardy claim because both felony murder based on robbery and burglary in the first degree require proof that the other does not require. (Appellant's App. D, pp. 11-13.) Appellant's collateral estoppel/issue preclusion claim was rejected on the ground that the instant prosecution did not involve any issue of ultimate fact litigated in the murder prosecution.

Appellant filed an application for discretionary review in the Iowa Supreme

Court on November 3, 1983. This application was denied on November 4, 1983.

Appellant filed a notice of appeal in the Iowa Supreme Court on November 4, 1983. Appellant's Memorandum Brief Supporting Notice of Appeal alleged only that the district court's ruling was a "final judgment" under Iowa Code § 814.6 (1983). On November 7, 1983, Appellant's appeal was dismissed without prejudice to raise the same issues in the event of a conviction.

Notice of appeal to this Court from the order of Chief Justice Reynoldson dismissing Appellant's appeal was filed in the Iowa Supreme Court on December 7, 1983. Appellant relies on 28 U.S.C. 1257(2).

SUMMARY OF ARGUMENT

Appellee presents two arguments. First, this Court lacks jurisdiction of this appeal. The order dismissing Appellant's appeal in the Iowa Supreme Court is not a final judgment by the highest court of the State in which a decision could be had on Appellant's

double jeopardy claim. Appellant's double jeopardy claim does not concern the constitutional validity of a state statute, and the constitutional validity of Iowa Code § 814.6(1) is not before this Court.

Second, the issues raised do not present substantial federal questions for determination. Iowa Code § 814.6(1) does not violate Appellant's constitutional right to an appeal because Appellant has no such right. Moreover, the pending prosecution for burglary in the first degree does not violate Appellant's right not to be placed twice in jeopardy for the same offense. Felony murder based on robbery and burglary each require an element not required for the other, and the instant prosecution does not concern an essential fact necessarily decided in Appellant's previous trial.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

1. The order of the Iowa Supreme Court dismissing Appellant's appeal is not an order by the highest court of the state in which a decision could be had on the issue of double jeopardy.

It is jurisdictional that an appeal run to the proper court. In Western Union Telegraph Co. v. Hughes, 203 U.S. 505 (1906), this Court, in considering whether it had jurisdiction of writ of error from the supreme court of appeals of Virginia, said:

> Treating the order of dismissal as a final judgment, we are now asked on this writ of error to reverse the ruling of the supreme court of appeals of Virginia. This, however, we cannot do. It is immaterial that the supreme court of appeals was vested by the state Constitution with appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the Constitution of Virginia or of the United States, or that, in the opinion delivered by the court, it discussed the Federal question and declared it to be without merit. The fact is undoubted that the writ of error was dismissed solely and expressly because of a want of jurisdiction, and the effect of the formal entry, adjudging that the court was without jurisdiction to

> pass upon the questions presented by the writ of error, cannot be different from what it would have been had the court not given expression to its views in a written opinion. The necessary result of the ruling that the court had not jurisdiction of the writ of error was to determine that the trial court was the final court where the questions presented by the writ could be decided; and hence, the writ of error should have been directed to that court.

Id. at 506-07 (emphasis added). This position was reaffirmed in Norfolk & S. Turnpike Co. v. Virginia, 226 U.S. 264 (1912):

> [W]e now state that from and after the opening of the next term of this court, when a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a state, declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the Crovo Case [dismissing for want of jurisdiction], and shall therefore, by not departing from the face of the record, solve against

> jurisdiction the ambiguity created by the form in which the state court has expressed its action.

Id. at 269.

There is no dispute in the instant case. Appellant's appeal to the Iowa Supreme Court was dismissed for lack of jurisdiction. Appellant admits as much on pages 1 and 4 of his jurisdictional statement. Moreover, it is clear that Justice Reynoldson did not rule on the merits of Appellant's double jeopardy claim since the appeal was dismissed without prejudice to raise the issue on appeal in the event that defendant was convicted. Thus, the Iowa District Court in and for Polk County is the highest court of Iowa in which a decision could be had on the issue of whether the instant prosecution violates double jeopardy and this appeal must be dismissed for want of jurisdiction.

2. The ruling of the Iowa District Court in and for Polk County denying Appellant's motion to dismiss for violation of double jeopardy does not constitute a ruling in favor of the validity of a state statute.

As applicable here, section 1257(2) limits appeal to those cases where a state statute has been challenged on the ground that it violates the federal constitution and has been found valid by a state court. Appellant's double jeopardy claim does not qualify to give this Court jurisdiction under section 1257(2), and this appeal should be dismissed.

3. There is no record that the state court was ever presented with or ruled on Appellant's constitutional challenge to Iowa Code § 814.6(1) (1983).

Appellant claims that Iowa Code § 814.6(1) is unconstitutional because it does not allow as a matter of right a defendant to obtain appellate review of an alleged double jeopardy claim prior to trial. There is no record that this issue was ever presented to the Iowa Supreme Court.

This Court has determined that it will not decide federal constitutional issues raised before it for the first time on review

of state court decisions. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). "At a minimum, however, there should be no doubt from the record that a claim under . . . . the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim. . . ." Webb v. Webb, 451 U.S. 493, 501 (1981).

Appellant's Memorandum Brief Supporting Notice of Appeal alleged only that the district court's ruling was a "final judgment" under Iowa Code § 814.6 (1983). There is no record that Appellant raised the constitutional issue below that he now seeks to raise in this Court, and thus, this appeal should be dismissed.

II. THIS APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.[1]

---

[1] In addition to the argument presented in I(1) above, the following reasons also apply to exercise of certiorari jurisdiction should the Court treat this appeal as a petition for writ of certiorari.

1. Iowa Code § 814.6 (1983) is not unconstitutional.

Appellant asserts that because he does not have an appeal of right under Iowa Code § 814.6 (1983) before trial on double jeopardy that that section is unconstitutional. This issue does not raise a substantial federal question.

Appellant has no constitutional right to appeal. Abney v. United States, 431 U.S. 651, 656 (Iowa 1977). How, then, can there be a constitutional right to appeal a particular issue at a particular time? "The right to appeal, as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute. . . ." Id.

Appellant's reliance on Abney and Harris v. Washington, 404 U.S. 55, 56 (1971) is misplaced. Those cases resolved questions of statutory construction concerning 28 U.S.C. § 1291 and 28 U.S.C. § 1257 respectively, not questions of constitutional law.

Finally, under state law a defendant can litigate a question of double jeopardy in the district court before trial. Appellant availed himself of that opportunity here. If a defendant is dissatisfied with the decision of the district court, he can seek discretionary review in the Iowa Supreme Court. Appellant availed himself that opportunity also. If discretionary review is denied, a defendant can challenge the district court ruling on appeal if trial results in an adverse verdict. The constitution does not require more.

2. The Double Jeopardy Clause does not bar prosecution of the Appellant for first degree burglary.

In Illinois v. Vitale, 447 U.S. 410 (1980), defendant was charged and convicted with failing to reduce speed to avoid an accident after his automobile struck and killed two children. Defendant was also charged with involuntary manslaughter based on the same incident. The Illinois Supreme

Court ruled that the manslaughter prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment.

This Court reversed stating, "the principal test for determining whether two offenses are the same for purposes of barring successive prosecutions . . . 'is whether each provision requires proof of a fact which the other does not.'" Id. at 416 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)). This "test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." Vitale at 416.

It is clear that felony murder based on robbery and burglary each require proof of an element not required for the other offense. Felony murder requires proof of a killing. Iowa Code §§ 707.1 and 707.2 (1983). Burglary requires proof of either a breaking, entering, or remaining on premises without permission. Iowa Code §§ 713.1 and 713.3

(1983). Thus, double jeopardy does not bar Appellant's prosecution for burglary in the first degree.

3. Collateral estoppel/issue preclusion does not bar Appellant's prosecution for burglary in the first degree.

In Ashe v. Swenson, 397 U.S. 436, 442-43 (1970), this Court held that the concept of collateral estoppel was included in the guarantee against double jeopardy. Collateral estoppel as applied here means "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443. In applying the test where a previous judgment of acquittal was based upon a general verdict, the court must "'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the

defendant seeks to foreclose from consideration.'" Id. at 444.

The instructions in the murder prosecution required that the jury find that Appellant stabbed Clifford Welling. No aiding and abetting theory was submitted to the jury. (Appellant's App. D, p. 26.) Thus, unlike Turner v. Arkansas, 407 U.S. 366 (1972), a general verdict of acquittal does not necessarily mean that the jury that considered Appellant's guilt for felony murder found that Appellant was not present at the scene of the crime. As the district court found:

> Further, as shown in this Court's finding of fact, there is overwhelming evidence in the record of the murder prosecution that this Defendant was present at the scene. A reasonable explanation for the verdict is that the jury believed Defendant was present but either Jimmy Allen or Reimers stabbed the victim. The jury might have disbelieved Reimers' denial and believed Ratigon's claim that Reimers told him he killed the victim.

(Appellant's App. D, p. 27.) Thus, the instant prosecution for burglary in the first degree does not involve an issue that was necessarily determined in the previous prosecution. If the jury determined that Reimers stabbed the victim, it did not need to reach the issue of Appellant's presence.

CONCLUSION

For all the above reasons, this appeal should be dismissed.

Respectfully submitted,

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